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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JERRY GLEN GARZA, Defendant and Appellant.	E053337 (Super.Ct.No. RIF10000241) OPINION

APPEAL from the Superior Court of Riverside County. Douglas E. Weathers, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christopher P. Beesley, and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jerry Glen Garza appeals after a jury trial, in which he was convicted of petty theft of items from a convenience store (Pen. Code, § 484, subd. (a); petty theft with a prior) and misdemeanor unlawful possession of marijuana (Health & Saf. Code, § 11357, subd. (b)). The jury was unable to reach verdicts on two additional charges, felony possession of heroin (Health & Saf. Code, § 11350, subd. (a)) and misdemeanor possession of a needle and syringe (Bus. & Prof. Code, § 4140). The court therefore dismissed those counts in the interests of justice (Pen. Code, § 1385). Defendant contends that the trial court erred in allowing a witness to testify about a store surveillance videotape she had reviewed, because neither the police nor the prosecution ever obtained or produced the tape. In other words, defendant complains of allowing oral testimony about a writing (videotape) that had become lost or unavailable, without meeting proper requirements for admission of secondary evidence. (Evid. Code, § 1521.) Defendant also argues that the court erred in failing to give a unanimity instruction, i.e., that the jurors must unanimously agree which of several items defendant stole, to support the conviction of petty theft (with a prior).

We conclude that the contentions are without merit and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On New Year's Eve (Dec. 31) of 2009, about 10:30 p.m., someone called police to report an altercation at a convenience store in Riverside. Riverside Police Officers Goodson and Crawford responded to the store. When they arrived on scene, they did not see any signs of a fight, nor anyone who fit the given description of the combatants.

Officer Crawford saw defendant walk out of the store, carrying two large boxes of chewing gum. Officer Crawford saw defendant walk behind a car, and he heard something hit the ground. Defendant made eye contact with the officer, and then began to run out of the parking lot. Officer Crawford alerted Officer Goodson; they both returned to their patrol car and gave chase. They saw defendant stopping by a palm tree, where he appeared to be discarding some items. Officer Goodson saw defendant drop something small and white; Officer Crawford, who was occupied with driving, did not see precisely the color or size of whatever defendant dropped.

Defendant then resumed running. The officers drove alongside defendant and fixed their spotlight on him. They ordered defendant to stop, and he ultimately complied. Officer Goodson handcuffed defendant, while Officer Crawford returned to the palm tree. By the tree, Officer Crawford found a white napkin on top of a poncho, which covered four or five bags of beef jerky. Inside the napkin, Officer Crawford found a hypodermic syringe and a small bindle of heroin.

The officers returned to the store, where they found two large vendor boxes of chewing gum on the ground behind a parked car. The officers brought the recovered items back into the store to have the clerk, Deborah Hurst, scan the prices. Officer Crawford remembered returning the poncho, the boxes of gum and the packages of jerky to the clerk. Officer Crawford also testified that he found an empty hanger on the poncho display inside the store.

The clerk remembered that the officer gave her items to tally, including a poncho, gum, beef jerky and some candy bars. The total value of the items was $80.59. Hurst, the store clerk, recognized defendant as having been inside the store, but she told the officers that she did not see defendant take anything from the store.

When defendant was booked into the jail, officers recovered a baggie from defendant's pocket; the baggie contained material that turned out to be about two grams of marijuana. The substance found in the bindle inside the napkin was later tested and determined to be 0.07 grams of heroin base.

As a result of these events, defendant was charged by information with four offenses: petty theft with a prior (count 1), felony possession of heroin (count 2), misdemeanor possession of a hypodermic needle and syringe (count 3), and misdemeanor possession of marijuana. The information also alleged that defendant had seven prior serious offense convictions (Pen. Code, § 667.5, subd. (b)) and one prior strike conviction (Pen. Code, §§ 667, 1170.12).

At trial, the People presented the officers' testimony, as outlined above. In addition, the clerk testified about her encounter with defendant at the convenience store. Among other things, she testified that she remembered seeing defendant in the store that night, and recalled that defendant had purchased some cigarettes from her. The clerk testified that the officers showed her a number of items, which she recognized as merchandise that could be purchased at the store. She made a "void" receipt at 11:07 p.m., of the items that the officers had showed her, and indicated that these were items

that had not been paid for. The items included six candy bars, a hooded poncho, and a large box of gum containing multiple packs. As already stated, the value of the items that the clerk ran on the void receipt was $80.59.

The clerk told Officer Goodson that she did not see defendant steal anything. The store had video surveillance cameras, but the clerk did not know how to operate the video system. The next day, the clerk had viewed some video footage with her store manager. The tape that the clerk reviewed was time-stamped between about 10:34 p.m. and 11:09 p.m., although the clerk later testified that she had reviewed tape commencing from about 10:00 p.m. The clerk had begun her work shift at 10:30 p.m. When she reviewed the video, she saw defendant take two items from the period during her shift: Defendant took some packages of beef jerky, which he ate while standing in line. On a portion of the video covering the time before the clerk started her shift, however, the clerk testified that she saw defendant take two boxes of gum and go outside. Then he returned, took more items and went outside again. He repeated this performance, taking the poncho on this occasion. After that, defendant came back into the store and bought cigarettes from the clerk.

The defense brought out in cross-examination of the officers that there was a drug treatment clinic nearby; defense counsel asked questions designed to highlight the possibility that a heroin addict seeking treatment at a treatment clinic might have discarded the heroin and syringe. The officers testified, however, that they observed no other pedestrians or activity near the palm tree on the night in question.

Defendant did not testify in his own defense. Defense counsel argued in closing that defendant should be acquitted on all the charges. Neither the officers nor the store clerks had actually seen defendant steal anything. The officers "rushed to judgment" in deciding that defendant must have stolen items from the store, as was indicated by their failure to follow up to obtain a copy of the store's video surveillance tape. Counsel argued that the officers' testimony, that they had seen defendant discard items by the palm tree, was not credible because the officers were some distance away and it was night time. Defense counsel suggested to the jury that someone other than defendant could have dropped the syringe and heroin near the palm tree, because of the drug clinic nearby.

After deliberations, the jury returned verdicts finding defendant guilty of the theft in count 1, and guilty of the misdemeanor possession of marijuana in count 4, but the jury was unable to reach verdicts on the counts concerning the heroin and the hypodermic needle. The court dismissed counts 2 and 3 pursuant to Penal Code section 1385, in the interests of justice.

In a bifurcated proceeding on the priors, defendant admitted six of his seven prior serious felonies (Pen. Code, § 667.5, subd. (b)), and admitted his strike prior. The court dismissed the seventh prior felony conviction allegation. At sentencing, the court sentenced defendant to the middle term of two years on count 1, doubled to four years as a second strike. The court imposed one year each for the first and third prior felony conviction offenses, for a total aggregate prison term of six years. The court dismissed

count 4 (misdemeanor marijuana possession) and the remaining prior felony conviction allegations in the interest of justice.

Defendant filed a timely notice of appeal.

ANALYSIS

I. The Admission of Secondary Evidence About the Store Surveillance Recording Was Harmless Error

Defendant first contends that the trial court erred in allowing Hurst, the store clerk, to testify about the contents of the surveillance videotape. A video recording is a "writing" for purposes of the secondary evidence rule. (*People v. Panah* (2005) 35 Cal.4th 395, 475.)

Under the secondary evidence rule (Evid. Code, § 1521), "(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

"(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

"(2) Admission of the secondary evidence would be unfair.

"(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).[1]

"(c) Nothing in this section excuses compliance with Section 1401 (authentication)."

Defendant urges that the admission of the clerk's testimony about the video recording violated Evidence Code section 1521 because: (1) the prosecution failed to authenticate the videotape (Evid. Code, § 1521, subd. (c)); (2) the prosecution failed to establish a foundation either that the videotape actually existed, or that the witness's testimony accurately described what the video recorded (Evid. Code, § 1521, subd. (a)(1), see also § 1523); and (3) the admission of the clerk's testimony was unfair to

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1 Evidence Code section 1523, subdivision (a), states the general rule that, "(a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing." However, Evidence Code section 1523 also provides for several exceptions to the general rule:

"(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

"(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

"(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

"(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

"(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

defendant, because the failure to produce the videotape rendered him unable to review it for himself (Evid. Code, § 1521, subd. (a)(2)).

Defendant also attacks the prosecution's compliance with Evidence Code section 1523, because the prosecution did not meet its burden to establish any of the exceptions, i.e., that an original writing has been lost without fraudulent intent (Evid. Code, § 1523, subd. (b)), that the writing was not reasonably procurable or was not related to the controlling issues in the case (Evid. Code, § 1523, subd. (c)), or that the evidence consisted of numerous writings when only a summary was needed, and producing all the writings would have been burdensome (Evid. Code, § 1523, subd. (d)).

Preliminarily, the People contend that trial defense counsel failed to object below in a sufficiently specific manner to preserve a claim that admission of the clerk's testimony violated Evidence Code section 1523. Rather, the People argue, the basis of trial counsel's objection was "foundation," and thus dealt with preliminary facts under Evidence Code section 402.[2] We are not persuaded.

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[2] Evidence Code section 402 provides:

"(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

"(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

"(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute."

On March 30, 2010, the second day of trial, an unreported discussion took place in chambers concerning the clerk's testimony. The parties have provided a settled statement of these unreported in camera proceedings. According to the settled statement, the court and both counsel met to discuss the admissibility of the clerk's testimony "relating to an alleged security camera video recording." Defense counsel "questioned" the "actual existence of the alleged video recording," because "it had not been produced to defense counsel in discovery." Defense counsel "objected to the admission of any mention of either the alleged video recording or any testimony relating to or based on this alleged video recording. The objection was based on a lack of foundation to establish that the alleged video recording ever in fact existed."

The court ruled that it "would admit testimony related to the alleged video recording over the objections" of defense counsel. Defense counsel thereupon reiterated his "objection to the admission of any testimony related to the alleged video recording."

Later the same day, a further discussion took place, out of the presence of the jury, which brought up the topic again. The court indicated that the clerk would be permitted to "testify to what she saw. She can lay a foundation that this came from the cameras inside the store." Defense counsel inquired, "And as far as authentication and why that was not brought to the attention of the People prior or to the law enforcement officers, that's fertile ground for cross?" The court indicated that the prosecutor had been informed "[a]pproximately two hours ago," that the clerk had viewed the videotape. The court stated on the record that, "we did have a conversation in chambers before the noon

recess here today, and I did indicate to defense counsel that if you wished, if you think it is important enough that you want to take a look at the videotape because you haven't seen it, and I guess we can see if we can get the same group of jurors to come back on Thursday." Defense counsel interjected, however, that "the problem is, Your Honor, there is no videotape." The court stated, "That's right. Well, the witness can testify to what she saw." Defense counsel acknowledged, "We understand that, Your Honor. My concern is whether or not I'd be able to cross-examine her as far as why that information was not provided to the police officers, why that information was only provided to --" The court replied, "You can ask her if they provided that information to law enforcement officers. That's fair."

We agree with defendant that trial counsel's objection, as described above, was sufficient to encompass a claim under Evidence Code sections 1521 and 1523, concerning the introduction of secondary evidence. Defense counsel's objection below went not merely to "foundation," but to the "foundation to establish that the alleged video recording ever in fact existed." A "genuine dispute" as to the existence of an original writing is one of the bases for excluding secondary evidence. (Evid. Code, § 1521, subd. (a)(1).) The colloquy between the court and counsel also touched on the issue whether the recording had been lost or destroyed: That is, the court stated that it would permit counsel to view the recording, but counsel remarked that "there is no videotape," suggesting that it was no longer existent or available.

We next analyze the substantive claim that the testimony was inadmissible under Evidence Code sections 1521 and 1523.

The clerk testified that, on the evening of the thefts, the officers had returned the stolen property to her, and had inquired of her whether the store had a surveillance system. To the clerk's own personal knowledge, there was surveillance equipment in the store. The clerk was not herself authorized to access the video recording or to make a copy for law enforcement. The computer equipment which ran the six surveillance cameras was maintained in the manager's office, which was unavailable to the clerk on the night shift. The clerk testified that it would be possible to make a copy of the surveillance footage onto a DVD; the officers had asked the clerk to have a copy made. The clerk told her manager that the officers wanted a copy of the video, and thought that the manager had done so, but the clerk "d[id]n't know what happened to the video. They keep them for so long," perhaps 30 days. The prosecutor asked the clerk, "So if a copy isn't made within 30 days, then there's no ability to get a copy again?" The clerk indicated that, "[t]he main office should have a copy, I would think," but she was not positive. The clerk stated that she "should have" brought a copy of the tape with her to court. She did not have a copy of the video recording, however: "[I]f I would have made a copy at that time, I would have brought one . . . [b]ut I didn't think about it."

The clerk testified that she viewed the video from the surveillance system on the day after the thefts. The system recorded a date and time stamp on the video. The clerk initially testified that the portion of the video she watched covered a period date-and-

time-stamped on December 31, 2009, from 10:34 p.m. to 11:09 p.m. On the video, the clerk saw defendant coming and going from the store several times, taking items from different areas of the store without paying for them.

There had been a shift change while defendant was at the store. The clerk began her shift at 10:30 p.m. Before that, another cashier had been working in the store. The clerk then realized that she had watched the video recording beginning at the stamped time of approximately 10:00 p.m. On the video, the clerk first saw defendant by the liquor department. Then he went to the back of the store and picked up a box of gum. Defendant walked around a bit, and then picked up a second box of gum. Defendant went out of the store and came back. The clerk then saw defendant return to the back of the store, where he took a poncho, and then went out again. The last time, defendant got in line to purchase cigarettes, but he also took some beef jerky and ate it while waiting in line. He did not pay for the jerky when he bought the cigarettes.

The clerk's testimony was sufficient to establish the existence of the video recording. One of the officers also testified at trial that he noted the video surveillance cameras and inquired about having a copy of the surveillance tape made. The items that the clerk testified seeing defendant take from the store—the boxes of gum, packages of beef jerky, and the poncho—matched the items recovered outside the store. In fact, one of the officers observed defendant carrying the boxes of gum out of the store. One of the officers independently saw an empty hanger on the poncho display. The videotape also showed defendant waiting in a line of customers, where he ultimately purchased a pack

of cigarettes. The clerk produced a store receipt showing the purchase of the cigarettes (but nothing else) at the time defendant was inside the store. Substantial and uncontradicted evidence corroborated the contents of the video recording as testified to by the clerk. Despite the settled statement, then, which indicates that defense counsel had objected that there was no "foundation to establish that the alleged video recording ever in fact existed," the testimony of the witnesses at trial was sufficient foundation for the existence of the video recording. There was no "genuine dispute" concerning its initial existence, so as to preclude the clerk's testimony as secondary evidence.

Secondary evidence should also be excluded, however, if it fails to meet the standards of Evidence Code section 1523. Evidence Code section 1523, subdivision (d)—admission of a summary of numerous writings to avoid burdensome admission of multiple documents—has no applicability here. The more germane subdivisions are (b) and (c), concerning loss or destruction of an original out of the proponent's custody, without fraudulent intent, on the one hand, or when the proponent does not have custody and control of the original and either the writing was not reasonably procurable, or it was not closely related to the controlling issues, on the other.

One of the officers testified that, although he had initially requested a copy of the video recording, neither officer followed up on that request. Officer Goodson also testified that he did not obtain the video because, on the night of the crime, the clerk was unable to access the system. Thereafter, he did not return to the store to get a copy of the

video recording because, "[t]o me, it was a pretty obvious case." The video recording was thus never in the possession, custody or control of the police or the prosecutor.

With respect to Evidence Code section 1523, subdivision (b), the loss or destruction of the recording, the clerk's testimony suggested, but did not conclusively establish, that the video recording had been lost or destroyed. She testified that the video recordings were held in the system for perhaps 30 days. However, when she was asked if the video recording could no longer be obtained after 30 days, she stated that the "main office" might still have a copy.

With respect to Evidence Code section 1523, subdivision (c), the evidence was insufficient to establish that the video was not reasonably procurable by the use of the court's process, or by other means. Officer Goodson's testimony, for example, showed that he did not follow up with the convenience store to obtain the video recording, even though he had initially requested a copy. To his knowledge, Officer Crawford also failed to follow up with the store management about the video recording. For their own purposes, the officers decided that the case was sufficient without the tape, but that did not negate the possibility that a copy could have been procured if it had been timely sought.

As the evidence stands, there was neither a showing that the recording had been lost or destroyed, nor a showing that it was not reasonably procurable. Therefore, strictly speaking, the clerk's testimony about the videotape should have been excluded under Evidence Code section 1523.

However, we also note that defense counsel had been offered the opportunity of a continuance to obtain and review the video recording. The issue was discussed on Tuesday, March 30, 2010, and the court had suggested a continuance until Thursday to allow the defense to obtain and review the recording. Defense counsel tacitly declined this proffer, however, with the remark, "the problem is . . . there is no videotape." Counsel's statement is either an admission that the video had been lost or destroyed (meaning that Evid. Code, § 1523, subd. (b) was satisfied), or a decision to forgo a reasonable opportunity to procure the video (satisfying the conditions of Evid. Code, § 1523, subd. (c)). Counsel's own actions belied the purported ambiguity of the evidence on these critical points.

In any case, we conclude that the admission of the clerk's testimony about the video recording was harmless. Officer Goodson had not followed up on obtaining a copy of the video because, after discussing the matter with the prosecutor, he decided that it was not important to obtain the videotape. He considered it a "pretty obvious case" without the surveillance recording. We agree. The officers arrived on the scene at the store in answer to a different complaint—an alleged fight taking place—and caught defendant virtually red-handed as he was stealing the store merchandise. Defendant walked past one of the officers, carrying the two boxes of stolen gum. He dropped the boxes behind a parked car and took off running. As the officers returned to their patrol car to give chase, defendant continued to run, and the officers saw defendant discard and abandon something by the palm tree. Eventually, defendant heeded orders to stop, and he

was taken into custody. At the palm tree location, the officers found several items, including packages of jerky (one opened) and a poncho. The boxes of gum were also recovered where defendant had dropped them in the parking lot. The store clerk identified all the items as matching merchandise sold in the store. The officers found an empty hanger on the store's poncho display. Store receipts showed that defendant had paid only for a pack of cigarettes, and not for a poncho, candy bars, jerky, or gum.

"'[S]tate law error in admitting evidence is subject to the traditional *Watson* [*People v. Watson* (1956) 46 Cal.2d 818, 836] test: The reviewing court must ask whether it is reasonably probable the verdict[s] would have been more favorable to the defendant absent the error. [Citations.]' [Citation.]" (*People v. Covarrubias* (2011) 202 Cal.App.4th 1, 21, fn. omitted.) Given the overwhelming evidence that defendant stole multiple items from the convenience store, there was no reasonable probability that the verdict would have been any different, even in the absence of the testimony describing the surveillance video.

II. No Unanimity Instruction Was Required as to Each Individual Item Stolen From the Store

Defendant next contends that the trial court committed reversible error in failing to instruct sua sponte on unanimity with regard to the petty theft charge, i.e., that the jury must unanimously agree as to which particular item or items defendant had stolen to support a verdict on count 1.

Defendant argues that the evidence was different as to some of the items. That is, Officer Crawford saw defendant carrying the boxes of gum, which were dropped in the parking lot. The officers did not see defendant carrying the remaining items taken from the store; rather, they saw him drop several objects, including a shoe-box-sized parcel, at the palm tree, before defendant continued running away. The officers later recovered the packages of jerky and the poncho (and presumably the candy bars) at the palm tree location. The officers also found the hypodermic syringe and a bindle of heroin at the palm tree site, but the jury did not convict defendant on the counts related to the syringe and the heroin. Thus, defendant argues, if the jury had been given a unanimity instruction, "it is reasonably likely the jury would *not* have found [him] guilty of stealing the items found next to the tree, because they acquitted him of possessing the needle and heroin[] that were also found there."

Defendant also points to inconsistencies in the testimony of Officer Crawford and the store clerk, with respect to the order in which defendant supposedly took the items from the store. According to the clerk's review of the video, defendant took the gum out of the store first, then he returned and took the poncho, and the last time he purchased some cigarettes (and ate some beef jerky while waiting in line) before he left the store. Officer Crawford testified that he saw defendant carrying the boxes of gum out of the store immediately before running away. Defendant argues that these two versions are irreconcilable, thus rendering the evidence inconsistent and unreliable.

We reject defendant's claim of error. In the first place, the testimony of the clerk and Officer Goodson is not necessarily in conflict. The clerk testified that she saw (on the video) defendant take the boxes of gum first. "And then he either went out that time, then he came back in, he was walking around, and then he got a couple of other items that was on there [i.e., on the voided receipt for the stolen property]." Obviously, defendant had put down the boxes of gum somewhere, while he returned to the store to take more items, because he did not continue to carry them as he walked about the store. That he later (after the final act of purchasing one pack of cigarettes) picked up the boxes of gum again, and walked with them past Officer Crawford, is wholly consistent with the clerk's description of defendant's conduct inside the store.

In the second place, the jury did not acquit defendant of possession of the syringe and the heroin. Rather, the jury was unable to reach a unanimous verdict on those counts. The jury's inability to return a unanimous verdict does not support defendant's speculation that the jury did not find that defendant stole the jerky, poncho, or other items also found at the tree.

In the third place, no unanimity instruction is required "'if the evidence shows . . . multiple acts in a continuous course of conduct. [Citation.]' [Citation.] 'This is because . . . the multiple acts constitute one discrete criminal event. [Citation.]' [Citation.] 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]' [Citation.]" (*People v. Flores* (2007) 157 Cal.App.4th 216, 222-223.)

Here, the defense as to any or all of the stolen items was the same: There was no direct evidence that the clerks, or anyone else, had seen defendant (or anyone) steal any of the items. Instead, the officers simply "rushed to judgment" that defendant must have stolen the items. The defense presented did not provide any reasonable basis for the jurors to distinguish between the various property items for purposes of count 1. "When two offenses are so closely connected in time that they form part of one transaction, no unanimity instruction is required." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1533, citing *People v. Diedrich* (1982) 31 Cal.3d 263, 282.)

Finally, even if the court erred in failing to give a unanimity instruction, the error was harmless. "The failure to provide a unanimity instruction is subject to the *Chapman* harmless error analysis on appeal."[3] (*People v. Curry* (2007) 158 Cal.App.4th 766, 783, fn. omitted.) "'[W]e must inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction. [Citation.]' [Citation.]" (*People v. Wolfe*, *supra*, 114 Cal.App.4th 177, 188.)

Here, as in *People v. Wolfe*, defendant presented a unitary defense as to all the merchandise: No one saw him take anything from the store. However, the evidence was

[3] As the parties acknowledge, there is a split of authority among the Courts of Appeal on the appropriate standard of error for failure to give a unanimity instruction. The split of authority was described in *People v. Wolfe* (2003) 114 Cal.App.4th 177 at pages 185-186 (Fourth Dist., Div. Two). In *Wolfe*, we selected the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] as the appropriate standard.

uncontradicted that defendant was seen leaving the store with merchandise (boxes of gum) he had not paid for. The evidence was likewise uncontradicted that defendant was seen discarding additional items, which matched store merchandise; defendant had not paid for these items either. There was no basis for the jurors to distinguish one item from another in terms of the defense, and the jury's verdict necessarily resolved that basic credibility question adversely to defendant.

"'Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]' [Citation.]" (*People v. Curry*, *supra*, 158 Cal.App.4th 766, 783.) We likewise conclude that any error in failing to give a unanimity instruction, on the evidence here, was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.